STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2003
v	No. 238736 Calhoun Circuit Court
JAMES WILLIAM BRADY, Defendant-Appellant.	LC No. 00-001136-FH

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), negligent homicide, MCL 750.324, and failure to stop at the scene of a serious personal injury accident, MCL 257.617. The trial court sentenced defendant to concurrent terms of imprisonment of 8 to 15 years' for the OUIL causing death conviction, 12 to 24 months' for the negligent homicide conviction, and 30 to 60 months' for the failure to stop conviction. We affirm.

Defendant first argues that there was insufficient evidence to convict him of failure to stop at the scene of a serious personal injury accident because there was no evidence that defendant knew that the victim was seriously injured. We disagree.

"In deciding whether there was sufficient evidence to support a conviction, this Court should view the evidence in a light most favorable to the prosecution and decide whether any rational fact-finder could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Shipley*, 256 Mich App 367, 374-375; 662 NW2d 856 (2003). MCL 257.617 requires the prosecutor to prove that the defendant knew or had reason to believe that serious injury or death resulted from the accident in which he was involved. *People v Lang*, 250 Mich App 565, 572; 649 NW2d 102 (2002). This statute

> plainly contemplates finding a driver liable not only on the basis of his actual knowledge of the nature of an accident, but also on the basis of the driver's constructive knowledge—what the driver reasonably should have known given the circumstances surrounding the accident. Accordingly, no driver could escape liability merely by attempting to remain wilfully ignorant of the nature of the consequences of an accident. [*Id.* at 576.]

Here, while increasing speed and attempting to pass a semi, defendant lost control of the vehicle he was driving and hit a fence, knocking down several fence posts and shattering the vehicle's windshield. Defendant had a cut on his forehead. One passenger complained of hand and back pain, another was "bleeding pretty bad" and told defendant to call "911." One of the passengers requested that they go to the hospital. Further, two of the passengers testified that the victim, normally a talkative person, either was not talking or was repeating an obscenity. Despite defendant's testimony to the contrary, the surviving passengers indicated that they did not remember or did not think that defendant inquired whether everyone was alright. On this record, sufficient evidence existed to support defendant's conviction.

Defendant next argues that several instances of prosecutorial misconduct denied him a fair trial. We review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

Two of defendant's alleged instances of prosecutorial misconduct were preserved by objections and we will address those first. Defendant claims that he was unfairly prejudiced when the prosecutor asked him if he did not tell his wife about having a girlfriend because the relationship was not serious. While a prosecutor may not ask witnesses questions on cross-examination that have no relevance to the case and are intended to degrade the witnesses, *People v Whalen*, 390 Mich 672, 685-686; 213 NW2d 116 (1973), witness credibility is a material issue, *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, modified 450 Mich 1212 (1995), and may be impeached on cross-examination by questions about specific conduct regarding truthfulness, MRE 608(b). To the extent the prosecutor's question in the present case may have been improper, it did not deny defendant a fair and impartial trial where it addressed issues raised by defense counsel, *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), and did not make defendant look any more dishonest than the lies defendant admitted to telling police. Moreover, the trial court's instructions to the jury indicating that attorneys' questions to witnesses are not evidence dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant also claims that the prosecutor shifted the burden of proof to him by erroneously informing the jury that it could not draw inferences from the evidence. However, when viewing the prosecutor's closing argument in its entirety, it appears that the prosecutor urged the jury to reach logical conclusions from the facts as opposed to mere supposition. Moreover, "once the defendant advances . . . a theory, arguments with regard to the inferences created does not shift the burden of proof" to the defendant. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Thus, the prosecutor's comment did not shift the burden to defendant in the case at hand. Moreover, the trial court's instructions to the jury, including to disregard statements of law made by attorneys that conflict with the trial court's instructions and that circumstantial evidence requires inferences to be drawn from other facts, cured any purported prejudice. *Bahoda*, *supra*; *People v Grayer*, 252 Mich App 349, 358-359; 651 NW2d 818 (2002).

The remaining alleged instances of prosecutorial misconduct were not objected to below, and thus our review of these unpreserved claims is for outcome-determinative plain error. *Pfaffle*, *supra*; see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant claims that he was denied a fair trial when the prosecutor told the jury that a police officer did nothing wrong because defendant's blood alcohol content ultimately was admitted as evidence. The record reveals that the challenged comments were made in response to defense counsel's closing argument. "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Schutte, supra*. Moreover, defendant failed to object below, and any error could have been cured by a timely instruction. *Schutte, supra* at 721-722. Defendant has not shown outcome-determinative plain error. *Carines, supra*.

Defendant also claims that the prosecutor made a number of statements about the medical examiner's testimony that were not supported by the record and mischaracterized expert testimony. We find no error. The prosecutor's statements were supported by facts in evidence and a prosecutor may argue the evidence and draw reasonable inferences from testimony. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Defendant also argues that while each of these purported errors, standing alone, may not require reversal, their cumulative effect denied defendant a fair trial. Generally, the cumulative effect of individually harmless errors warrants reversal if it was so seriously prejudicial that it denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, to the extent that there may have been prosecutorial error, it was cured by instruction. Defendant was not denied a fair trial.

Defendant next argues that the trial court abused its discretion in permitting the medical examiner to testify as an expert regarding the physiological effects of alcohol. We disagree. We review for an abuse of discretion a trial court's decision to qualify a witness as an expert and to admit that testimony. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made." *Id.*

In the present case, we cannot say that the trial court abused its discretion. The expert is a medical doctor, albeit a pathologist. Arguable deficiencies in the expert witness' expertise as applied to physiological effects of alcohol in living people might have been relevant to the weight of his testimony, but such considerations did not preclude its admission. Cf. *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 259-260; 533 NW2d 356 (1995) (gaps in the expertise of an expert witness were relevant to the weight of the testimony, not to its admissibility).

Finally, defendant argues that resentencing is required due to errors in the scoring of the legislative sentencing guidelines. "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). The sentencing court has discretion in determining the number of points to be scored, provided that there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant claims that offense variable (OV) 8 was incorrectly scored fifteen points for transporting the victim to a place of greater danger. According to defendant, this score was improper because the victim could not have been saved even if treated at the scene and the house

was not a place of greater danger. However, we find that evidence in the record supports the trial court's scoring of OV 8, which concerns, as relevant to the present case, whether "[a] victim was asported to another place of greater danger or to a situation of greater danger." MCL 777.38(1)(a). Defendant drove the victim from the accident scene where somebody had stopped to see if they were alright and took him to a house where, according to one witness, there was no phone. Further, defendant at first refused to call "911" on his cell phone, despite the pleas of that witness. See *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

Defendant next argues that prior record variable (PRV) 7, which concerns subsequent or concurrent felony convictions, MCL 777.57(1), was incorrectly scored at twenty points. According to defendant, his convictions of OUIL causing death, MCL 257.625(4), and negligent homicide, MCL 750.324, violate his federal and state constitutional rights to not be twice placed in double jeopardy. We disagree in both instances, and thus conclude that there was no error in the scoring of PRV 7.

A double jeopardy challenge is a question of law that we review de novo. *People v Kulpinski*, 243 Mich App 8, 12; 620 NW2d 537 (2000). Defendant's federal double jeopardy rights were not violated because each of the offenses for which defendant was convicted requires proof of an element that the other does not. *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 2d 306 (1932); *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997); cf *Kulpinski, supra* at 15-16, 23. See MCL 257.625(4); MCL 750.324. Nor were defendant's state double jeopardy rights violated because the two statutes are intended to prohibit conduct affecting distinct societal norms. Cf *Kulpinski, supra* at 10-24; *People v Ayers*, 213 Mich App 708, 716-721; 540 NW2d 791 (1995).

To the extent that defendant further claims that PRV 7 was improperly scored because his conviction of failure to stop at the scene of a serious personal injury accident, MCL 257.617, should have been dismissed for insufficient evidence, and because the negligence homicide conviction must be vacated on double jeopardy grounds, our previous conclusions concerning these arguments render defendant's instant argument concerning PRV 7 without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell